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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KURT A. MACLEAN,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES et al.,

Defendants and Respondents.

B153835

(Super. Ct. No. BC220482)

APPEAL from a judgment of the Superior Court of Los Angeles County.

J. Michael Byrne, Judge. Affirmed.

Oppenheimer Wolff & Donnelly, Kevin W. Kirsch, Murray J. Robertson, Aimee Y. Wong and Paul C. Nyquist for Plaintiff and Appellant.

Lloyd W. Pellman, County Counsel, Kevin C. Brazile, Assistant County Counsel, and Brian T. Chu, Senior Deputy County Counsel, for Defendants and Respondents.

Plaintiff and appellant Kurt MacLean appeals from a judgment of dismissal following the granting of a motion for nonsuit in favor of defendants and respondents Los Angeles County Fire Department firefighter Jeffrey Ziegler and the County of Los Angeles in this personal injury action. MacLean contends there was sufficient evidence to support a finding that Ziegler's actions to control traffic at the scene of an automobile accident were grossly negligent. We affirm.

### **PROCEDURAL BACKGROUND**

On November 19, 1999, MacLean filed a complaint against Ziegler and the County for damages arising out of a motorcycle accident. A four-day jury trial began on August 27, 2001. On August 30, 2001, after the presentation of MacLean's evidence, Ziegler and the County made an oral motion for nonsuit on the ground that there was insufficient evidence to support a finding of gross negligence, including insufficient evidence of the standard of care for fire department personnel maintaining traffic safety at an accident scene. The trial court granted the motion for nonsuit on the ground that Ziegler's failure to stop a vehicle at a particular location was not sufficient to support a finding of gross negligence. On September 27, 2001, the trial court entered its order granting the motion and judgment in favor of Ziegler and the County. MacLean filed a timely notice of appeal.

### **FACTS**

At approximately 7:00 a.m. on Sunday, August 2, 1998, MacLean was riding a motorcycle on Angeles Crest Highway, a winding mountain road. Ziegler is employed as a firefighter by the Los Angeles County Fire Department and had been assigned to patrol the highway. Some parts of the highway are cut into the mountain and a single lane of traffic runs in each direction. At one such location, a single-car accident took place in the

downhill lane, blocking the traffic in that lane. Downhill from the accident site was a straight section of road, after which the road curved out of sight. There is a small dirt and gravel shoulder on both sides.

A fire engine captain at the scene of the accident instructed Ziegler to control the uphill traffic. Ziegler drove his patrol truck downhill past the accident site and stopped in an area without shadows. From that location, he had good visibility down the highway to the curve. He intended to stop traffic at the spot where he had parked his truck. From that area, he would have been able to coordinate visually with the person controlling traffic on the other side of the accident site. He realized vehicles coming uphill around the curve and along the straightaway would not be able to see the accident site. He turned on his truck's red flashing lights and got out. Ziegler did not have any flares, because it was the fire season. He did not have any other warning devices to place near his truck or on the highway. Ziegler had not received any formal training on traffic control procedures. He was dressed in a dark blue firefighter's uniform.

A vehicle traveling uphill came around the corner. Ziegler held up his hands to signal the driver to stop, but the driver did not stop. Ziegler began walking downhill at a faster than average pace in order to find a place to signal traffic where he would be more visible. A second vehicle approached, and Ziegler held up his hands for the driver to stop. Ziegler made eye contact with the driver. The driver kept going. Both of the vehicles that passed Ziegler also passed through the accident scene without incident. Ziegler continued walking down the highway, looking for an area that would provide better visibility for drivers coming around the curve and assessing the roadway.

The third vehicle to approach around the corner was a truck driven by Gregory Smith. Smith saw firefighters working on the accident approximately 150 feet ahead and Ziegler walking toward him with his hands in the air for Smith to stop. Smith stopped comfortably, approximately 5 to 10 seconds after seeing Ziegler. Ziegler was standing in

the middle of the road, and Smith stopped a few feet from him.<sup>1</sup> Ziegler intended for Smith to stop where Ziegler was standing in order that he could tell Smith to park farther up the road by the patrol truck and wait for instructions. He did not intend for Smith to stop in the shadow of the mountain. He realized that stopping a vehicle too close to the uphill curve created a hazard. He did not think he needed to take any extreme measures to have Smith move his truck immediately, such as running and waving his hands. He walked up and leaned in the window to speak to Smith and his son. They had dirt bikes in the back of the truck and asked if they would be able to get through on the highway to use the dirt bikes. Ziegler explained the situation. Two minutes after Ziegler had stopped Smith, he saw MacLean ride his motorcycle around the corner.<sup>2</sup>

Maclean had approached the turn traveling uphill at 50 miles an hour. The speed limit was 55 miles per hour. He could not see the road immediately around the turn, but had checked the part of the road that he could see approximately half a mile ahead. It was clear. He had increased his speed to 52 miles an hour in order to increase his stability in the turn. He initiated the turn, looked up the road and saw the truck stopped approximately three car lengths ahead of him in the shadow of the road. He saw Ziegler standing on the double yellow line in the middle of the road leaning in at the area of the driver's door. MacLean could not stop in time. He applied the brake, intending to pull the motorcycle upright, move into the open lane, and pass Ziegler on the left. Ziegler straightened, faced MacLean, and put up his hands. MacLean could no longer be certain which direction Ziegler was moving. Had MacLean continued, he would have hit Ziegler. MacLean purposefully turned the motorcycle on its right side and released it in the direction of the far side of the road. MacLean went under the truck and sustained

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<sup>1</sup> Conflicting testimony was given at trial concerning Ziegler's distance from the truck at the time Smith stopped. Estimates ranged from a few feet to 100 feet.

<sup>2</sup> Conflicting testimony was presented at trial as to the amount of time that passed between the truck stopping and the accident. Estimates ranged from 20 seconds to two minutes.

severe injuries. Had the truck been stopped just 20 feet farther from the turn, MacLean would have had time to stop.

Dr. Gustav Nystrom, a specialist in accident reconstruction, opined at trial that there was an inadequate stopping distance between Smith's stopped truck and a vehicle approaching around the corner. In his opinion, stopping Smith's vehicle at the point it was stopped created a serious hazard. Moreover, a flare, a reflective triangle or a flashing light appropriately placed would have provided an effective warning to drivers to modify their behavior.

## DISCUSSION

### **Standard of Review**

The Supreme Court has explained the standard of review of a grant of nonsuit as follows: "A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff[s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff[s] favor.'" [Citation.] A mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be *substantial evidence* to create the necessary conflict.' [Citation. Italics in original.]

"In reviewing a grant of nonsuit, we are 'guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff.' [Citation.] We will not sustain the judgment "unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions,

inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.” [Citation.]” (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

### **Gross Negligence**

MacLean contends there was sufficient evidence to allow a factfinder to conclude Ziegler’s conduct constituted gross negligence. We disagree.

In general, a public entity is not liable for an injury, whether the injury arises out of the act or omission of the public entity or a public employee, except as provided by statute. (Gov. Code, § 815, subd. (a).) Health and Safety Code section 1799.107, subdivision (b) provides specifically that “neither a public entity nor emergency rescue personnel shall be liable for any injury caused by an action taken by the emergency rescue personnel acting within the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner.” In addition, Health and Safety Code section 1799.107, subdivision (c) provides, “For purposes of this section, it shall be presumed that the action taken when providing emergency services was performed in good faith and without gross negligence. This presumption shall be one affecting the burden of proof.”

“[Gross negligence] is very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Many courts, dissatisfied with a term so devoid of all real content, have interpreted it as requiring wilful misconduct, or recklessness, or such utter lack of all care as will be evidence of either . . . . But most courts have considered that ‘gross negligence’ falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind.” (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358, quoting *Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, 197.) “California courts require a showing of “the want of even scant care or an

extreme departure from the ordinary standard of conduct” in order to establish gross negligence. [Citations.] Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence [citation] but not always. [Citation.]” (*Decker v. City of Imperial Beach, supra*, 209 Cal.App.3d at p. 358.)

“To avoid a finding of gross negligence, it is not required that a public entity must pursue all possible options. It is required only that they exercise some care, that they pursue a course of conduct which is not “an extreme departure from the ordinary standard of conduct.”” (*Decker v. City of Imperial Beach, supra*, 209 Cal.App.3d at p. 361.) Mere delay in taking requisite actions is insufficient to support a finding of gross negligence. (*Ibid*; *City of Santa Cruz v. Superior Court* (1988) 198 Cal.App.3d 999, 1007.)

The evidence of negligence in this case does not rise to the level necessary to permit a finding of gross negligence. The standard of care was to stop uphill traffic in a safe location. Despite Ziegler’s efforts to stop traffic at a safe distance from the curve, two cars passed without stopping. It was not safe to allow cars traveling at full speed to pass the accident site. The road was a two-lane road, the downhill lane of which was blocked. Ziegler concluded the cars had not seen him or had not seen him in sufficient time to stop as directed. He began walking downhill to find a position from which to signal vehicles traveling uphill in sufficient time for the vehicles to complete a safe stop. The next vehicle to appear was Smith’s truck. Smith stopped sooner than MacLean had expected or intended. Ziegler intended to advise Smith to move his truck to the area of the patrol truck. A maximum of two minutes passed from the time Smith stopped his truck to the time of MacLean’s accident, during which time Ziegler approached Smith’s truck to explain the need for the stop and provide further instructions to direct Smith. MacLean contends that because Ziegler knew vehicles coming around the curve could not see a vehicle stopped at the location of Smith’s truck in time to stop, he should not have attempted to stop vehicles at that particular location or he should have more immediately directed Smith to keep driving, such as by motioning with his hand for

Smith to keep driving forward. In fact, Ziegler intended to stop Smith higher up the road, but Smith stopped lower than Ziegler expected. Ziegler's decision to approach Smith and have a discussion, rather than motioning for him to keep driving, may have been negligent, but it did not show "a want of scant care." Mere delay in moving Smith does not constitute gross negligence. Ziegler was aware of the dangers presented by the two hazards and he attempted to exercise some care. This course of conduct was not an extreme departure from the ordinary standard of conduct, given the circumstances that he needed to prevent vehicles from driving through the accident site at full speed and he was not visible to cars that he had tried to stop farther uphill. The trial court properly granted the motion for nonsuit.

### **DISPOSITION**

The judgment is affirmed. Respondents Jeffrey Ziegler and the County of Los Angeles are awarded their costs on appeal.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.